(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Jett Black, Inc., Syd H. Levine & Associates, and Syd H. Levine	)	UIC Appeal Nos. 98-3 & 98-5
UIC Permit Nos. KYA0361 & KYA0362	)	

[Decided May 27, 1999]

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

JETT BLACK, INC.

UIC Appeal Nos. 98-3 & 98-5

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided May 27, 1999

Syllabus

Jett Black, Inc., Syd H. Levine & Associates, and Syd H. Levine (collectively, "petitioners") have filed two petitions for review of certain provisions of two Underground Injection Control ("UIC") permits issued by United States Environmental Protection Agency Region IV ("Region") to Jett Black, Inc. pursuant to the Safe Drinking Water Act ("SDWA"), as amended, 42 U.S.C. §§ 300f - 300j-26. Jett Black owns certain oil and gas leases, including what the parties refer to as the Randolph-Boling Lease and the Boling-Richards Unit Lease, located in the Easton Consolidated Field in Hancock County, Kentucky. The permits at issue in this case authorize the injection of fluids into existing Class II wells on these leases for the enhanced recovery of oil and natural gas.

After notifying EPA that they had been operating approximately seven injection wells on the Boling-Richards and Randolph-Boling Leases without complying with certain applicable UIC regulations, the prior owners of the Leases (Panther Creek Oil Company ("Panther") and Cranoil Kentucky, Inc.) entered into an Administrative Order on Consent ("AOC") with the Region requiring, among other things, that they submit UIC permit applications for the wells by June 30, 1989. The successor to Panther, Kenneth R. Ingle Associates (now known as Jett Black), complied with the AOC and submitted permit applications for wells located on both the Randolph-Boling Lease and Boling-Richards Unit Lease. The Region issued the final permit decisions on March 16, 1998. These petitions for review followed.

Petitioners raise a total of twenty-one objections to the permits. These include whether the Region's decision to require permits in this case was erroneous, whether certain permit conditions are overly restrictive, whether the permits' reporting and mechanical integrity testing requirements are overly broad, and whether the permit writer was biased against petitioners.

HELD:

The permit decisions are remanded. On remand, the Region is ordered to do the following:

* Revise the language in condition I.C.1.(b)(i) of the permits so that this condition refers to fractures in the confining zone rather than the injection zone;

* Either add annulus gel to the list of approved annular fluids or provide an explanation for rejecting petitioners' request for this change in light of the Region's past practices in this regard;

* Provide a reasoned response to petitioners' concerns regarding the need for a closed annulus;

* Revise the language of condition I.C.3 to clarify that it does not foreclose the possibility of continuing or resuming injection after a loss of mechanical integrity;

* Revise the permits to clarify that for wells that resume injection after having been shut-in, the permittee will have thirty days in which to submit an injection fluid analysis;

* Revise the language of condition I.E.3. or adequately respond to petitioners' concerns regarding its ability to obtain information on new wells constructed in the area of review of its existing wells; and

* Provide a detailed and fact-specific rationale for including a two-year mechanical integrity testing interval for the W-7 injection well on the Boling-Richards Unit Lease, refute petitioners' claim of inconsistent applications, or revise the testing interval.

On all other issues, review is denied.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

Petitioners, Jett Black, Inc., Syd H. Levine & Associates, and Syd H. Levine (collectively, "petitioners")[1] have filed two petitions for review of certain provisions of two Underground Injection Control ("UIC") permits issued by United States Environmental Protection Agency Region IV ("Region") to Jett Black, Inc. pursuant to the Safe Drinking Water Act ("SDWA"), as amended, 42 U.S.C. §§ 300f - 300j-26. Jett Black owns certain oil and gas leases, including what the parties refer to as the Randolph-Boling Lease and the Boling-Richards Unit Lease, located in the Easton Consolidated Field in Hancock County, Kentucky.[2] The permits at issue in this case authorize the injection of fluids into existing Class II

[1]According to the petitions, Syd H. Levine & Associates is a consultant to the permittee in this case, Jett Black, Inc., on UIC issues, and Syd H. Levine is a resident of Hancock County, Kentucky where the injection wells are located.

[2]The petition for review of the permit for injection wells located on the Randolph-Boling Lease (Permit No. KYA0361) has been designated by the Board as UIC Permit Appeal No. 98-3. The petition for review of the permit for injection wells located on the Boling-Richards Unit Lease (Permit No. KYA0362) has been designated by the Board as UIC Permit Appeal No. 98-5. Both petitions are titled: "Petition for Review of Underground Injection Control (UIC) Final Permit Decision," and both are dated April 21, 1998. Except for three issues raised in Appeal 98-5 relating to injection wells located on the Boling-Richards Unit Lease, the petitions are virtually identical. Therefore, for the sake of simplicity, the Board will cite only to the petition for review filed in Permit Appeal No. 98-5 in the following manner: "Petition at ___."

wells on these leases[3] for the enhanced recovery of oil and natural gas.[4] In conjunction with the permits, the Region issued a partial aquifer exemption for each permit for an aquifer located in the injection zone referred to as the Tar Springs Formation.[5] *See* Region IV's Response to Petition for Review (Aug. 17, 1998) ("Region's Response"); Exhibits ("Exhs.") 2 and 13 to Region's Response.[6] The partial aquifer exemption applies to an area extending for a one-quarter-mile radius from each of the wells. Exhs. 2, 13.

The parties (petitioners and the Region) state that the prior owners of the Leases were the Panther Creek Oil Company ("Panther") and Cranoil Kentucky, Inc. ("Cranoil"). Petition at 2; Region's Response at 1-2. On or about April 12, 1988, Panther and Cranoil notified EPA that they had been operating approximately seven injection wells on the Boling-Richards and Randolph-Boling Leases without complying with applicable

---

[3]The parties use the term "lease" in referring to the specific parcels of land on which the wells are located. Although "lease" typically refers to a legal arrangement rather than a parcel of land, for the purposes of this decision we have adopted the parties' terminology.

[4]Class II wells include "[w]ells which inject fluids * * * [f]or enhanced recovery of oil or natural gas[.]" 40 C.F.R. § 144.6(b)(2).

[5]The Tar Springs Formation is defined as the base of the lowermost underground source of drinking water. *See* Statement of Basis accompanying draft permits (Exhibits 6 and 14 to Region IV's Response to Petition for Review (Aug. 17, 1998)).

An aquifer exemption was necessary because the injection zone met the definition of an underground source of drinking water ("USDW") at 40 C.F.R. § 144.3. *See* 40 C.F.R. § 144.12 (Prohibition of movement of fluid into underground sources of drinking water). Under the regulations, aquifers or portions of aquifers that otherwise meet the definition of a USDW may be designated as exempted, provided certain criteria are met. *See* 40 C.F.R. §§ 144.7 (Identification of underground sources of drinking water and exempted aquifers) and 146.4 (Criteria for exempted aquifers).

[6]All citations to exhibits in this decision refer to the exhibits attached to the Region's Response.

UIC regulations (including inventory requirements).[7] Thereafter, Panther and Cranoil entered into an Administrative Order on Consent ("AOC") with Region IV requiring, among other things, that they submit a UIC permit application by June 30, 1989. *See* Findings and Administrative Order on Consent with Stipulated Administrative Penalties, Docket No. 4-UICC-035-88 (Exh. 23).[8]

On June 30, 1989, in compliance with the AOC, the successor to Panther, Kenneth R. Ingle Associates (now known as Jett Black), submitted permit applications for wells located on both the Randolph-Boling Lease and Boling-Richards Unit Lease. Region's Response at 2. At the Region's request, Jett Black submitted amended permit applications for both Leases on September 3, 1997. *Id*. The Region issued draft permits on December 16, 1997 and December 30, 1997, along with a proposed partial aquifer exemption for the Tar Springs Formation. Region's Response at 2; Exhs. 6a, 14a. Petitioners submitted combined written comments on the draft permits on February 27, 1998. Exh. 4.

---

[7]Under 40 C.F.R. part 144, existing Class II enhanced recovery injection wells, such as the ones at issue in this case, are

> authorized by rule for the life of the well or project, if the owner or operator injects into the existing well within one year after the date which a UIC program authorized under the SDWA becomes effective for the first time or inventories the well pursuant to § 144.26.

40 C.F.R. § 144.22(a). Panther and/or Cranoil apparently satisfied the requirement that injection occur within one year of the date the UIC program became authorized in Kentucky. Part 144 of the UIC regulations further states that the owner or operator of a well authorized by rule is prohibited from injecting into the well "[u]pon failure to submit inventory information in a timely manner pursuant to § 144.26[.]" 40 C.F.R. § 144.22(c)(3). Under 40 C.F.R. § 144.26, owners or operators must submit inventory information within one year after "the date of approval or effective date of the UIC program for the State." 40 C.F.R. § 144.26(d). The deadline in the present case under this provision was June 25, 1985.

[8]The AOC was signed by Panther and Cranoil on April 24, 1989, and by Region IV on July 18, 1989.

The Region issued the final permit decisions on March 16, 1998 (Exhs. 1, 12) along with a response to comments (Exh. 3). On the same date, the Region issued partial aquifer exemptions for both permits. Exhs. 2, 13. These petitions for review followed.

Petitioners raise numerous objections to the permits. As previously stated, except for three issues concerning the permit for injection wells located on the Boling-Richard Unit Lease, the objections to both permits are virtually identical. The objections common to both permits are as follows: (1) issuance of the permits was unnecessary because the injection wells were rule-authorized as a matter of law (Petition at 3-4); (2) the AOC, under which submission of the permit applications was required, is null and void as a matter of law (*id*. at 4); (3) Jett Black did not receive proper notice that it was required to apply for the instant UIC permits (*id.*); (4) the Region's action in requiring Jett Black to obtain permits in this case was arbitrary and capricious, an abuse of discretion, and discriminatory (*id*. at 5); (5) the permits should contain less stringent requirements because no underground sources of drinking water ("USDWs") exist within or under the area of review of the injection wells (*id*. at 5-6)[9]; (6) the Region erred in issuing only partial aquifer exemptions for the Tar Springs Formation (*id*. at 6); (7) the permits improperly restrict the injection wells to injection only through tubing and packer (*id*. at 7); (8) the requirement that Jett Black perform mechanical integrity testing ("MIT") within thirty days of the effective date of the permits is unreasonable (*id*.); (9) the Region has erroneously failed to address whether Jett Black is entitled to relief from the MIT requirements pursuant to 40 C.F.R. § 146.8 (Mechanical integrity) (*id*. at 7-8); (10) the permits erroneously require that injection pressure shall not initiate fractures or propagate existing fractures in the "injection zone" rather than the "confining zone" (*id.* at 8); (11) the permits are overly restrictive with respect to acceptable annular fluid (*id*. at 8-9); (12) the permits

[9]Under 40 C.F.R. § 144.3, "area of review" is defined as the area surrounding the injection well calculated according to the criteria set forth in 40 C.F.R. § 146.6. Section 146.6 calls for the area of review to be determined according to calculation of a "zone of endangering influence" or according to a "fixed radius method."

improperly require a closed annulus and monitoring of annulus pressure (*id*. at 9); (13) the permits are overly restrictive with respect to loss of mechanical integrity (*id*.); (14) the permits impose unreasonable injection fluid analysis requirements (*id*.); (15) the permits' reporting requirements are overly broad and vague (*id*. at 10); (16) the permits improperly require reporting of new wells drilled in the area of review of the existing wells (*id*.); (17) there is no regulatory basis for the permits' requirements concerning naturally occurring radioactive material ("NORM") (*id*.); and (18) the permit writer was biased against petitioners (*id*. at 11). The additional objections related to the permit authorizing injection on the Boling-Richards Unit Lease are as follows: (1) the permit improperly requires a demonstration of internal mechanical integrity before injection is authorized (*id*.); (2) the permit improperly requires that one well (referred to as W-7) pass a mechanical integrity test once every two years rather than every five years (*id*.); and (3) the Region's failure to grant petitioners' request for an extended time frame for performing remedial work on the W-7 well was erroneous (*id*. at 12).

As indicated above, the Region submitted a response to the petitions on August 17, 1998. With the Board's permission, petitioners submitted a reply to the Region's Response on October 2, 1998. Petitioners' Reply to Region IV Response to Petitions for Review ("Petitioners' Reply").

II. *DISCUSSION*

Under the rules governing this proceeding, a UIC permit decision will ordinarily not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a). As the Board has stated on numerous occasions, the Board's power of review should be "sparingly exercised" and "most permit conditions should be finally determined at the Regional level." *In re NE Hub Partners, L.P.*, UIC Appeal Nos. 97-3 & 97-4, slip op. at 9 (EAB, May 1, 1998), 7 E.A.D. ___ (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). The burden of demonstrating that review is warranted

rests with the petitioner who challenges the Region's permit decision or the conditions contained in the permit. *See* 40 C.F.R. § 124.19(a); *In re Environmental Disposal Sys., Inc.*, UIC Appeal Nos. 98-1 & 98-2, slip op. at 4 (EAB, Oct. 15, 1998), 8 E.A.D. ___.

In addition, as a prerequisite to obtaining review, a petitioner must have "raise[d] all reasonably ascertainable issues and submit[ted] all reasonably ascertainable arguments supporting [its] position by the close of the public comment period (including any public hearing) under § 124.10." 40 C.F.R. § 124.13; *Environmental Disposal Sys.*, slip op. at 9 n.7; *In re Brine Disposal Well*, 4 E.A.D. 736, 740 (EAB 1993). Further, 40 C.F.R. § 124.19 requires a demonstration that "any issues being raised [in a petition for review] were raised during the public comment period (including any public hearing)." As the Board has previously explained, compliance with these requirements is necessary to "ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final." *Brine Disposal*, 4 E.A.D. at 740 (quoting *In re Renkiewicz SWD-18*, 4 E.A.D. 61, 64 (EAB 1992)). Any issues not previously raised may not be raised on appeal except to the extent that these issues were not reasonably ascertainable or concern changes from the draft to the final permit decision. 40 C.F.R. § 124.19(a).

After careful consideration of the arguments raised in the petitions for review, the Region's Response, Petitioners' Reply, and the relevant portions of the administrative record underlying the permit decisions, the Board concludes that the permits must be remanded so that the Region can address seven issues raised in the petitions. On all remaining issues, petitioners have not met the standards necessary to invoke Board review, and review is accordingly denied.

A. *Issues Common to Both Permits*

1. *Rule Authorization*

Petitioners assert that the Region abused its discretion by issuing the UIC permits in this case because the subject UIC wells are rule authorized as a matter of law and therefore do not require UIC permits. Petition at 4. In support of this assertion, petitioners merely state that "EPA headquarters has previously indicated that permitting was not necessary * * *." *Id.*

In making this assertion, petitioners are apparently referring to a July 6, 1994 memorandum from Barbara Elkus. *See* Memorandum from Barbara Elkus, Acting Director of the U.S. EPA Groundwater Protection Division in the Office of Water, to Beverly Houston, Associate Division Director for Groundwater and Facilities, regarding "Loss of Authorization to Inject into Existing Class II Enhanced Recovery Wells That Failed to Submit Timely Inventory Information Under 40 C.F.R. § 144.26" ("Memorandum") (Exh. 26). The Memorandum states, in part:

> Headquarters has agreed to restructure §144.26 to make it clear that it is permissible for existing Class II enhanced recovery well owners/operators who did not submit inventory information in a timely manner to begin injecting after submitting the missing inventory information without having to obtain a UIC permit.

Memorandum at 2.

The Memorandum goes on to state that as a stopgap measure, it would be permissible for the Region to issue an AOC allowing injection under the provisions of the AOC, provided the AOC also contained a schedule requiring the well owner or operator to come into compliance with the existing UIC regulations, with a compliance date set after the expected date of the rule change. This clearly suggests that the existing

regulations could not be fully complied with by allowing injection under an AOC unless and until the regulations were modified ("restructured") as suggested in the Memorandum. As the Region points out, the Agency has not made the suggested change to 40 C.F.R. § 144.26.

As previously stated, the permit applications were submitted pursuant to an AOC signed by the Region and the predecessors to Jett Black. The AOC states that it "shall apply to and be binding upon * * * successors and assigns." AOC at 3 (Exh. 23). In addition, the Region has invoked the authority of 40 C.F.R. § 144.25(a)(1) for requiring the submission of permit applications in this case. Letter from Mary Kay Lynch, Water Programs Enforcement Branch, to Syd Levine at 4-5 (Feb. 24, 1997) ("Lynch Letter") (Exh. 27).[10] This section states that the Agency has the authority to require owners or operators to obtain a UIC permit when "[t]he injection well is not in compliance with any requirement of the rule[.]" The Lynch Letter states that because Jett Black was in violation of various UIC regulations, including the inventory requirements discussed above, the Region was requiring the submission of complete UIC permit applications "pursuant to both the AOC and 40 C.F.R. § 144.25." Lynch Letter at 5.[11] For these reasons, we reject petitioners' assertion that the Region lacked the authority to require the permits in this case.

---

[10]This letter is explicitly referenced in the Region's response to comments on the draft permits.

[11]We note that in a letter dated June 16, 1997, from Syd H. Levine to various individuals in Region IV, including Mary K. Lynch, Mr. Levine concedes that the Region "could invoke 40 C.F.R. § 144.25" in this case. Exh. 25C.

Petitioners have asserted that the AOC is "null and void as a matter of law." Petition at 4. Because the requirement that Jett Black obtain a permit was based both on the authority of the AOC and 40 C.F.R. § 144.25, we need not reach this issue. Moreover, as previously stated, the AOC was executed in 1989 and required the submission of a permit application. In compliance with the terms of the AOC, the predecessors to Jett Black submitted permit applications in 1989 and Jett Black submitted amended applications in 1997. Under these circumstances, petitioners cannot now be heard to challenge the validity of the AOC in the context of this permit appeal.

Petitioners have also asserted that Jett Black was not given sufficient notice pursuant to 40 C.F.R. § 144.25(b) that it was required to apply for individual UIC permits. We disagree. Section 144.25(b) states, in part, that the Agency may require the owner or operator of a rule-authorized well to "apply for * * * [a] permit under this paragraph only if the owner or operator has been notified in writing that a permit application is required." As previously stated, the predecessors to Jett Black entered into an AOC requiring the submission of permit applications for the wells at issue in this case. In particular, the AOC states, among other things, that "[r]espondent shall submit to EPA an administratively complete permit application" for the injection wells it plans to operate. AOC at 4 (Exh.23). In addition, on June 4, 1997, the Region reaffirmed its intention to require that the wells at issue in this case be permitted. In particular, the Region informed Jett Black that the previously submitted applications were technically deficient and that the Region would require additional information. *See* Exh. 9. Petitioners' assertion that Jett Black lacked adequate notice of the permitting requirement is therefore rejected. In any case, the fact that Jett Black submitted timely permit applications demonstrates that Jett Black was not prejudiced in any way by the notice it received. *See In re Pontiki Coal Corp.*, 3 E.A.D. 572, 574 (Adm'r 1991) (the defense of not having received written notice from EPA as provided in the regulations "is only available to owners of rule-authorized wells who failed to apply for a permit because they were not notified that a permit was required. The notice requirement is not meant to protect owners or operators who, for whatever reason, submit an application and participate in the permitting, but do not get a favorable result.").

Because nothing in the petitions for review or the record before us convinces us that the Region abused its discretion in requiring Jett Black to obtain the permits at issue in this case, review is denied.[12]

---

[12]We also reject petitioners' unsupported assertion that the Region abused its discretion by requiring permits in this case because "[t]here is no way to distinguish between the rule authorized existing injection wells subject to the permit[s] herein, and hundreds of existing wells in Western Kentucky[.]" Petition at 5. As previously stated, the permits in the present case were required pursuant to the terms of the AOC, after the (continued...)

2. *USDWs*

Petitioners assert that no USDWs[13] exist within the area of review of the injection wells and that petitioners are therefore entitled to relief under 40 C.F.R. § 144.16 (Waiver of requirements by Director). Petition at 5-6. That section provides, in part:

> *When injection does not occur into, through or above an underground source of drinking water,* the [Region] may authorize a well or project with less stringent requirements for area of review, construction, mechanical integrity, operation, monitoring, and reporting than required [under applicable regulations] to the extent that the reduction in requirements will not result in an increased risk of movement of fluids into an underground source of drinking water.

40 C.F.R. § 144.16(a) (emphasis in original). According to petitioners, "Region IV has not responded adequately" to petitioners' assertion in this regard. Petition at 5.

---

[12](...continued)
prior owners of the Leases failed to comply with the inventory requirements. The status of other wells in Kentucky (whose owners or operators may have timely complied with these requirements) is neither before us nor relevant under these circumstances.

[13]An underground source of drinking water is defined as:

> [A]n aquifer or its portion:
> (a)(1) Which supplies any public water system; or
> (2) Which contains a sufficient quantity of ground water to supply a public water system; and
> (i) Currently supplies drinking water for human consumption; or
> (ii) Contains fewer than 10,000 mg/l total dissolved solids; and
> (b) Which is not an exempted aquifer.

40 C.F.R. § 144.3.

As the Region points out, however, and as petitioners concede, even if it were true that the injection wells do not endanger any USDWs, the Region was not required to provide relief under section 144.16. Region's Response at 8; Petitioners' Reply at 11-12. That section authorizes but does not require less stringent permitting requirements. Thus, in order to support a grant of review, petitioners must show why, in the absence of a USDW, the Region's decision not to impose less stringent requirements was clearly erroneous. Because the petitioners have not attempted to do so but instead rely solely on the erroneous proposition that Jett Black is entitled to less stringent permitting requirements because of the absence of USDWs in the area of review, they have failed to convince us that review is warranted on this issue.[14]

3. *Partial Aquifer Exemption*

As stated above, in conjunction with the permits, the Region issued a partial aquifer exemption for the Tar Springs Formation for a one-quarter-mile radius around each of the wells covered by the permits.[15]

---

[14]In their reply, petitioners concede that "even in the absence of USDWs, the relief contemplated at 40 C.F.R. § 144.16 is discretionary." Petitioners' Reply at 11. Petitioners assert, however, that the preamble to this section indicates that "upon a demonstration that no USDWs exist, and that contamination of a distant USDW through lateral displacement is not a danger, it was intended that relief be granted." *Id*. at 12. We disagree. If anything, the preamble reiterates that discretion is given to the Region to determine whether any additional requirements need to be applied in particular instances. *See* 45 Fed. Reg. 42,474 (June 24, 1980) ("[D]iscretion is given to the [Region] to determine whether any additional requirements need to be applied in particular instances."). As noted above, petitioners have not shown the Region's exercise of judgment in this case to be clearly erroneous. Under these circumstances, petitioners have not convinced us that review is warranted on this issue.

[15]Under 40 C.F.R. § 144.7(a), the Agency is required to protect as a USDW, except where exempted, "all aquifers or parts of aquifers which meet the definition of [a USDW] in § 144.3." Under section 146.4 an aquifer *or a portion thereof* that would otherwise meet the definition of a USDW may be designated as an exempted aquifer, provided certain criteria are met. *See also* 40 C.F.R. § 144.7(b). Identification of an exempted aquifer may allow underground injection of contaminants where such (continued...)

Exhs. 2, 13. An aquifer or a portion thereof may be considered as exempt if it meets the following criteria:

> (a) It does not currently serve as a source of drinking water; and
> (b) It cannot now and will not in the future serve as a source of drinking water because:
> (1) It is mineral, hydrocarbon or geothermal energy producing, or can be demonstrated by a permit applicant as part of a permit application for a Class II or III operation to contain minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible[; or]
>
> * * * * * * *
>
> (c) The total dissolved solids content of the ground water is more than 3,000 and less than 10,000 mg/l and it is not reasonably expected to supply a public water system.

40 C.F.R. § 146.4.

According to petitioners, the Region erred in granting only a partial aquifer exemption for the Tar Springs Formation for a one-quarter mile radius around each well rather than for the entire Easton Consolidated Oil Field. Petition at 6. In support of this assertion, petitioners state only that "[t]o do otherwise is to suggest that other operators of injection wells on other oil Leases in the Easton Consolidated Oil Field are guilty of injecting into a USDW." *Id*. We find no basis for granting review on this issue.

As the Region states in is response:

---

[15](...continued)
injection would otherwise be prohibited.

> Region 4 granted a partial aquifer exemption because the Permittee submitted water quality sampling data demonstrating the criteria had been met only for the area of its own injection wells and has never provided data for the entire field and Tar Springs Aquifer. The Permittee failed to submit sufficient information to exempt the entire Tar Springs Formation * * *.

Region's Response at 10; *see also* Fact Sheet accompanying aquifer exemptions for both permits (Exhs. 7, 15) ("The lack of formation data necessitates using a simplistic approach to determining the area to be exempted. The least technically sophisticated method is the use of arbitrary fixed radii."). Because nothing in the petition for review convinces us that the Region's determination in this regard was erroneous of otherwise warrants review, review is denied on this issue.

4. *Tubing and Packer*

Petitioners assert that the permits "improperly restrict[] the subject * * * injection wells to injection only through tubing and packer."[16] Petition at 7. We disagree. Although the applicable regulations do not mandate tubing and packer for Class II wells, nothing prohibits the Region from requiring it in appropriate circumstances. *See* EPA Office of Drinking Water, Statement of Basis and Purpose Underground Injection

---

[16]The Agency has described tubing and packer as:

> [A] removable liner device within a well which isolates the casing of the well from injected fluids. By preventing this contact between casing and injected fluids, the possibility of movement of contaminants through leaks in the casing is greatly diminished. Tubing and packer offers two further advantages. It isolates the annulus (between tubing and casing) from the injection zone, facilitating detection of any leaks in the tubing. It allows for visual inspection of the tubing during routine maintenance.

EPA Office of Drinking Water, Statement of Basis and Purpose, Underground Injection Control Regulations at 19 (May 1980).

Control Regulations at 20 (May 1980) ("Even though a tubing and packer requirement is not mandatory for [Class II wells] Directors should require its use when appropriate to prevent migration into underground sources of drinking water."). Nothing in the petitions convinces us the Region's determination on this issue was erroneous.

Moreover, the record indicates the permits are based on injection into wells with a tubing and packer design, because that is how the wells for which the permits were sought were constructed. As the Region states in its response, "[t]he wells were not and are not casing injectors and the permit was therefore not issued for casing injectors." Region's Response at 11. As the permits are predicated on the assumption that the wells are constructed using a tubing and packer design, requiring that injection take place through such wells does not strike us as unreasonable.

Finally, we note that the petitions do not indicate which, if any, of the permitted wells petitioners may wish to reconfigure as casing injectors.[17] Indeed, as they stated in their comments on the draft permits, "[t]he permits should be sufficiently broad to also cover the subject wells as casing injectors *should the applicant so desire to configure said wells*." Combined Formal Written Comments on Draft UIC Permits at 3 ("Petitioners' Comments") (Exh.4) (emphasis added). As the Region stated in its response to comments on this issue, "[a] modification to the permit can be requested by an operator if a variance of the tubing and packer requirement is necessary." Response to Comments on Draft UIC Permits KYA0361 and KYA0362 at 2 (Exh. 3). We are confident that should Jett Black request a permit modification for this purpose in the future, the Region will act appropriately.

5. *Mechanical Integrity Tests*

Petitioners assert that the permits improperly require that mechanical integrity tests ("MITs") be performed within thirty days of the

[17]As discussed later in this decision, one of the wells located on the Boling-Richards Unit Lease is authorized to operate as a casing injector.

permits' effective date. According to petitioners, "[n]inety days is an absolute minimum practical timetable to conduct MITs * * *." Petition at 7. Once again, however, petitioners provide no support for this assertion, nor do they explain why additional time is necessary in this case. The petitions therefore lack the specificity necessary to justify review of the thirty-day requirement.[18]

Petitioners have also argued that the Region erred in failing to allow Jett Black to demonstrate mechanical integrity using monitoring records pursuant to 40 C.F.R. § 146.8(b)(3). For the following reason, review is rejected on this issue.

In a letter dated February 24, 1997, from Region IV to Syd Levine (and referenced in the Region's response to comments on the draft permits), the Region responded to similar concerns regarding mechanical integrity testing. Letter from Mary Kay Lynch, Chief, Region IV Water Programs Enforcement Branch, to Syd Levine ("Feb. 24 Letter") (Exh. 27). In particular, the Region stated in part:

> 40 C.F.R. § 146.8(b)(3) deals with only two kinds of wells: wells constructed without a packer [(b)(3)(i)] and

---

[18]Petitioners also assert that MITs should not be required if the wells are "shut-in." As this argument was not raised during the comment period, however, it was not preserved for review.

> We note that in its response, the Region states:
>
> > As a rule, if injection wells are temporarily shut down due to seasonal conditions and an owner or operator requests additional time related to that seasonal condition, EPA will not require MIT for the wells because of the hardship posed to the owner or operator. Typically, the Region would allow the owner/operator time to return the wells to operational status before scheduling an MIT.
>
> Region's Response at 11. We are confident that the Region will act reasonably should Jett Black request additional time to comply with MIT requirements where wells have been shut-in.

> wells constructed without a long-string casing but with surface casing which terminates at the base of the fresh water aquifer [(b)(3)(ii)]. Further, § 146.8(b)(3)(i) requires an initial pressure test, and § 146.8(b)(3)(ii) requires a visual inspection of the annular space and a monitoring program as a prerequisite to using monitoring records. If these requirements are not met, then the records monitoring would not be sufficient to demonstrate mechanical integrity. It is EPA's understanding that no such prerequisite tests have been performed.

Feb. 24 Letter at 6. In its response to the petitions, the Region reiterates its assertion that the injection wells covered by these permits employ a tubing and packer design and therefore are not constructed in the manner contemplated by section 146.8(b)(3). Region's Response at 12.

In their reply to the Region's Response on the issue of whether the wells are constructed in the manner contemplated by section 146.8(b)(3), petitioners assert that this provision was intended to afford relief to all Class II wells and thus should be interpreted as applying to the wells at issue in this case. Petitioners Reply at 16. As this provision clearly limits the type of wells to which it applies, petitioners' assertion is rejected. Finally, we note that petitioners do not address the Region's statement in the Feb. 24 Letter that Jett Black failed to meet the prerequisites of 40 C.F.R. § 146.8(b)(3). Under these circumstances, we conclude that Board review is not warranted.

6. *Injection Pressure*

According to petitioners:

> Part I, Section C.1.(b)(i) of the subject Permit[s] requires that "Injection pressure shall not initiate fractures or propagate existing fractures in the injection zone." No such standard exists in the UIC regulations for class II

> wells. The actual standard is that injection pressure must not initiate new fractures or propagate existing fractures in the **confining zone**, not the injection zone.

Petition at 8. The Region has agreed to change the language in this condition in the manner requested by petitioners and has requested that the permits be remanded for that purpose. Region's Response at 12. Under these circumstances, the permits are remanded for appropriate modifications in this regard.

7. *Annulus Fluid*

Section I.C.2. of the permits states, in part, that "[t]he annulus between the tubing and the long-string casing shall be filled with brine or other fluid as approved by the director." Exhs. 1, 12. In its comments on the draft permits, petitioners requested that gel be added to the list of annular fluids. Petitioners' Comments at 5 (Exh. 4). Petitioners noted that annulus gel had been previously approved and used in Region IV, a fact that Region IV has not disputed. In its response to comments, the Region summarily denied the request.

Petitioners argue before the Board that the reversal of the Region's past practice on annulus gel and the resulting failure to approve the use of this gel was erroneous. Petition at 8. In its response, the Region states that the use of annular gel was rejected because the gel "will not inhibit corrosion in the annular area and is not designed and marketed as an annular additive." Region's Response at 13. While this may be true, the Region provides no citations to the administrative record indicating that it relied upon this rationale below, nor does the Region respond to petitioners' assertions that the Region has approved the use of annulus gel in the past.

Because we find the Region's explanation for rejecting petitioners' request to add annulus gel to the list of approved annular fluids inadequate based on the administrative record before us, this issue is remanded. On

remand, the Region is ordered to either approve the use of annular gel or provide a more complete explanation for rejecting petitioners' request.

8. *Annulus Status*

Petitioners argue that "[n]either a closed annulus, nor monitoring of annulus pressure, can be required under the present UIC regulations." Petition at 9. In addition, petitioners have asserted that for shallow injection wells, such as the ones at issue here, an open annulus is actually "the preferred mode of operation." Petitioners' Comments at 5; Petitioners' Reply at 19. Petitioners further state that "an open annulus can often provide an indication of a problem faster and more conclusively than a closed annulus." Petitioners' Reply at 18.

Petitioners' arguments in this regard apparently relate to condition I.C.2. of the permits. That condition requires monitoring of annulus pressure and states, in part, that "[t]he annulus pressure shall be maintained at 0 psig."

In response, the Region states that in order to maintain an annulus pressure of 0 psig, the annulus must be closed.[19] The Region further states that it has the legal authority to require monitoring of annulus pressure. In particular, the Region states that under the UIC regulations, monitoring of annulus pressure is a standard method of detecting leaks in the casing, tubing, or packer. Region's Response at 14; 40 C.F.R.

---

[19]We note that condition I.C.2. of the permit governing injection wells on the Boling-Richards Unit Lease (Permit No. KYA0362) states, in part:

> For those well [*sic*] completed with an *open annulus*, the annulus between the tubing and the long-string casing shall be filled with Brine or other fluid as approved by the Director. The annulus pressure shall be maintained at 0 psig.

(emphasis added). It would appear from the wording of this condition that, contrary to the Region's assertion in its response, the Region considers it possible that wells with an open annulus can nevertheless maintain an annulus pressure of 0 psig.

§ 146.8(b)(1).[20] The Region does not respond to petitioners' assertion that an open annulus would be the preferable mode of operation for the wells in this case.

Although we agree that the regulations authorize the Region to require monitoring of annulus pressure in appropriate circumstances, the Region's failure to adequately respond to petitioners' assertion regarding an open annulus requires that the permits be remanded on this issue. On remand, the Region must either provide a reasoned response to petitioners' concerns or revise the permits accordingly.

9. *Loss of Mechanical Integrity*

Section I.C.3. of the permits states, in part:

Loss of Mechanical Integrity During Operation

> The Permittee shall cease injection if a loss of mechanical integrity as defined at 40 C.F.R. § 146.8 becomes evident during operation. Operation shall not resume until the permittee has complied with the provisions of Part II, Section G, of this permit regarding mechanical integrity demonstration and testing.

Exhs. 1, 12. Petitioners argue that this provision is overly restrictive because the regulations "actually contemplate continued injection after loss of mechanical integrity under certain circumstances." Petition at 9.

---

[20]Section 146.8 states, in part:

> (b) One of the following methods must be used to evaluate the absence of significant leaks under paragraph (a)(1) of this section: (1) Following an initial pressure test, monitoring of the tubing-casing annulus pressure with sufficient frequency to be representative, as determined by the Director, while maintaining an annulus pressure different from atmospheric pressure measured at the surface * * *.

In their reply to the Region's Response, petitioners state that they "merely request that the permit contain language that does not preclude a demonstration under 40 C.F.R. § 144.51(g)(3)." Petitioners' Reply at 19-20. We assume that petitioners are referring to 40 C.F.R. § 144.51(q)(3), which states: "The Director may allow the owner or operator of a well that lacks mechanical integrity pursuant to § 146.8(a)(1) of this chapter, to continue or resume injection, if the owner or operator has made a satisfactory demonstration that there is no movement of fluid into or between USDWs."

In its response, the Region concedes that this section allows continued injection in certain circumstances even after a loss of mechanical integrity. Region's Response at 15. In particular, the Region states:

> The Petitioners are correct in their assertion that in certain circumstances continued injection may be allowed after the loss of mechanical integrity. Specifically, where the owner or operator makes a satisfactory demonstration that there is no movement of fluid into or between USDWs, 40 C.F.R. Section 144.51(q)(3) provides that the Regional Administrator may allow the owner or operator to continue or resume injection. The burden of making that demonstration is on the owner or operator wishing to continue or resume injection.

Id. Despite the Region's statement in this regard, the permit appears to require a cessation of injection in all cases. Under these circumstances, the permit is remanded on this issue and the Region is ordered to modify the permit to clarify that it does not foreclose the possibility of seeking relief under 40 C.F.R. § 144.51(q)(3).

10. *Injection Fluid Analysis*

Condition I.D.3. of the permits states, in part, that "[t]he permittee shall conduct an injection fluid analysis at least once every

twelve (12) months and whenever changes are made to the injection fluid." Exhs. 1, 12. Petitioners assert that the Region was without authority to impose an annual injection fluid analysis requirement and that such a requirement imposes an unnecessary burden on Jett Black as long as the injection fluids remain unchanged. Petitioners' Comments at 6.

As the Region states in its response, however, 40 C.F.R. § 146.23(b) provides, in part, that:

> Monitoring requirements shall, at a minimum, include:
> (1) Monitoring of the nature of injected fluids at time intervals sufficiently frequent to yield data representative of their characteristics[.]

40 C.F.R. § 146.23(b)(1). In the present case, the Region has determined that injection fluid analysis on an annual basis is necessary to meet this requirement. Nothing in the petition or record before us convinces us that this determination was erroneous.

Petitioners have also asserted that if the annual fluid analysis requirement remains in the permit, such a requirement should not be imposed "until ninety (90) days after resumption of injection activities." Petition at 9. Apparently, petitioners are concerned that the Region will apply the annual testing requirement to wells not currently injecting (shut-in). *See* Petitioners' Comments at 6 ("it is difficult to sample injection fluids when there is none."). The Region does not directly respond to this concern. Rather, it states that "Region 4, in its discretion, requires that in the case of those wells not injecting, the first fluid analysis may be submitted 30 days after the commencement of injection. The Petitioners have offered no basis for extending this time frame to 90 days." Region's Response at 16.

This thirty-day requirement, however, is not contained in permit condition I.D.3., nor does the Region reference another permit condition containing such a provision. The permit is therefore remanded on this issue. On remand, the Region must revise the permit to clarify that for

wells that resume injection after having been shut-in, the permittee will have thirty-days for submission of an injection fluid analysis.

11. *Disclosure Requirement*

Permit condition I.E.1. states:

> 1. *Reports on Well Tests and Workovers*
>
> Within ninety (90) days after the completion of the activity, the permittee shall report to the Director the results of the following:
>
> (a) Mechanical integrity tests other than those specified in Part I, Section B, item 3; and
>
> (b) Any well workover, logging or other test data, other than those specified in Part I, Section B, item 3, revealing downhole conditions.

Exhs. 1, 12. According to petitioners, this requirement "is so broad and vague as to raise serious questions as to what is expected of the Permittee." Petition at 10.

Because this issue was not raised during the comment period, however, it was not preserved for review.[21] *In re Environmental Disposal*

---

[21]In their comments on the draft permit, petitioners stated:

> [U]less such MIT, logging, or other test data revealed a loss of mechanical integrity or other dangerous condition, said information is none of Region IV's business. This is a basic constitutional issue; the language at Part I, Section E.1. should be modified. Region IV does not impose this requirement on rule authorized Class II wells.

Petitioners' Comments at 6.

Sys., Inc., UIC Appeal Nos. 98-1 & 98-2, slip op. at 9-10 (EAB, Oct. 15, 1998), 8 E.A.D. ___. Review is therefore denied on this issue.

12. *Reporting of New Wells*

Permit condition I.E.3. requires that Jett Black report new wells drilled in the area of review of the existing injection wells covered by the subject permits. Exhs. 1, 12. Petitioners assert that this provision should be removed from the permit because "[t]here is no regulatory basis to require reporting of new wells drilled in the area of review * * *." Petition at 10. Petitioners also argue that it is unreasonable for the Region to require that Jett Black know whenever another owner or operator is planning the construction of a new well in the area of review. Petitioners' Comments at 6-7; Petitioners' Reply at 21.

In its response, the Region states that, under the "omnibus" permitting authority of 40 C.F.R. § 144.52(a)(9), the Region has the authority to "impose on a case-by-case basis such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water." Region's Response at 17. The Region states further that it "has determined it is necessary to be informed of any new wells in the AOR because if a new well is improperly abandoned or not constructed properly it could serve as a conduit for contamination from the Permittee's wells to a USDW." *Id*. The Region does not address petitioners' assertion that Jett Black may not be aware of new wells drilled in the area of review of the existing wells.

While we agree that the Region has the legal authority to include a provision relating to new wells, there may be cases where such a requirement, at least as currently framed, would nevertheless be unreasonable. 40 C.F.R. § 144.31(e)(7) requires, among other things, that permit applicants provide in an application information on the existence of wells "listed in the public records or otherwise known to the applicant within a quarter mile of the facility property boundary." *See In re Pennzoil Exploration & Prod. Co.*, 2 E.A.D. 730, 733 (Adm'r 1989) (the burden of identifying all known wells within the project's boundaries is on

the permit applicant). The omnibus provision at 40 C.F.R. § 144.52(a)(9) provides adequate support for continuing this type of obligation in some reasonable form during the term of the permits. This provision provides the Region with broad discretion in determining appropriate permit conditions. *See In re Envotech, L.P*, 6 E.A.D. 260, 281 (EAB 1996).

However, as currently worded the language of permit condition I.E.3. requires reporting of construction plans for *any* new well within the area of review, without regard to the type of well, whether the well is listed in the public records or known to Jett Black, or the level of diligence Jett Black must exercise in acquiring this information. The reporting must be done within ten days of the new well's "spud" date. This provision states that it applies to "any construction or recompletion activity regardless of ownership of the well." Under the circumstances of this case, such an absolute requirement is unreasonable. If Jett Black was not privy to all information regarding new wells constructed within the area of review of its existing wells, full compliance would be difficult, if not impossible, to achieve. Because the Region has not adequately responded to petitioners' concerns in this regard, the permit is remanded on this issue. On remand, the Region must either revise the permit, or adequately respond to petitioners' concerns.

13. *NORM*

Permit condition I.F. provides:

> During the operating life of these wells, this injection facility may be screened for technologically enhanced naturally occurring radioactive material ("NORM") by EPA or another party. If the permittee is notified by a party other than EPA, or becomes aware at any time that elevated levels of NORM waste have been detected at this injection facility, the permittee must notify EPA in writing of that fact no later than 45 days prior to the permittee's intent to [plug and abandon ("P&A")] the well. EPA may require the permittee to revise the P&A

> plan to insure the safe disposal and proper management of the elevated levels of NORM waste.

Exhs. 1, 12. Petitioners assert that there is no regulatory basis for this requirement. In addition, in commenting on the draft permits, petitioners stated that "[e]xtensive research leads us to be quite confident that NORM is not a concern in the Easton Consolidated Oil Field." Petitioners' Comments at 7 (Exh. 4).

In its reply, the Region relies on the omnibus permitting authority of 40 C.F.R. § 144.52(a)(9) as authority for including the above-quoted permit requirement.[22] The Region further states:

> Contrary to petitioners' contention, NORM may be or become a problem with the wells in issue. NORM is virtually everywhere in the earth's environment and oil production processes may result in increased levels that pose a threat to human health. In oil production NORM is brought to the surface with produced brine water and associated sediment, or may be deposited as scale in well tubing, flow lines and tanks. Typically, as a field is depleted of oil, the oil water ratio changes to reflect less produced oil and a higher ratio of produced water. As the water usually exhibits higher NORM levels, the produced fluid will exhibit increasingly elevated NORM as the field matures. The NORM may become separated over time and stored in oil water separators on site. NORM levels will also increase in the scale and sludge which accumulates around a well. Therefore a site which exhibited a "safe" or non-elevated reading upon initial

[22]The Region actually cites to section 144.52(a)(1). As section (a)(1) refers to construction requirements and does not contain the language quoted by the Region, however, we assume that the Region intended to cite section 144.52(a)(9). This section states: "The Director shall impose on a case-by-case basis such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water."

> NORM screening may eventually require effective removal of elevated NORM.

Region's Response at 18. The Region also states that remediation of NORM-contaminated wells and oil production facilities has been necessary at other sites in Region IV, including other oil fields in Kentucky. *Id.*

In their reply, petitioners continue to assert that "NORM is not and will not be a problem in the Easton Consolidated Field." Petitioners' Reply at 22. In support of this assertion, petitioners state that "[w]aterflooding has been conducted at the Easton Consolidated Field for in excess of 45 years, yet careful screening reveals no NORM problems within said field. At several locations, due to fresh water flooding, produced water chloride content is far below 600 mg/l (ppm), with virtually no exotic salts." *Id.*

Even if true, petitioners' assertions in this regard do not convince us that the Region's determination to include this permit term was erroneous. The term merely anticipates a contingency that may or may not occur and requires action only in the event of the contingency. Petitioners do not assert that the action required under the provision in the event of a NORM problem is unreasonable. Notably, neither do they dispute the Region's assertion that over time, as a field is depleted, produced fluid can exhibit elevated NORM levels (as has occurred elsewhere in Kentucky). Under these circumstances, we find nothing unreasonable or erroneous in the Region's decision to include this permit provision. Review is therefore denied on this issue.[23]

---

[23]Petitioners also assert that the requirement is vague and unenforceable. Petitioners' Reply at 22. As this issue was not raised during the comment period, however, review is denied.

14. *Bias*

Petitioners assert that the individual responsible for preparing the permits in this case exhibited bias against them and that the Region erred in failing to assign a different permit writer. In support of this assertion, petitioners state that at a September 15, 1997 meeting in Atlanta, the permit writer who prepared the permits in this case, Mr. William Mann, made a negative comment about petitioners. According to petitioners, Mr. Mann announced at this meeting that "Region IV had been too kind to Petitioners in the past." Petitioners' Reply at 23.

As the Board has previously stated, an unbiased decision maker is an essential element in any meaningful due process hearing, including the administrative permitting process. *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 784 (EAB 1995) (citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)). In order to show bias, however, a party must establish not only that a decision maker formed or expressed opinions about issues before him/her, but that the decision maker was "'so psychologically wedded to [those opinions that [he/she]] would consciously or unconsciously avoid the appearance of having erred or changed position,' and that such opinions 'as a practical or legal matter foreclosed fair and effective consideration' of the evidence presented during the permitting process." *Marine Shale* at 786-87 (quoting *Withrow v. Larkin*, 421 U.S. 35, 57-58 (1975). Petitioners' unsubstantiated assertions regarding Mr. Mann's alleged bias in this case do not come close to meeting this standard. Review is therefore denied.[24]

---

[24]In their reply, Petitioners raise additional incidents of alleged bias by Mr. Mann not raised during the comment period. In particular, petitioners state:

> Mr. Mann has provided incorrect information on an expert witness report in a civil case involving the petitioners herein.
>
> Mr. Mann indicated that he did not contribute to or even see a draft of the February 24, 1997 Mary K. Lynch letter mentioned by Region

(continued...)

B. *Issues Applicable to Boling-Richards Unit Lease (UIC Appeal No. 98-5 - Permit No. KYA0362)*

1. *Mechanical Integrity Testing*[25]

Permit condition I.B.3. states, in part, that "[a] demonstration of the internal mechanical integrity of each well is required before injection can be authorized." Exh. 12. Petitioners assert that, except for one well on the Boling-Richards Unit Lease (referred to as W-7), the wells have previously passed MIT tests. Thus, according to petitioners, the Region abused its discretion by including this provision in the permit. Petition at 11.

In its response, the Region points out that under the applicable regulations, the owner or operator of class II enhanced recovery wells,

---

[24](...continued)
IV herein. However, an FOIA request resulted in Mr. Mann being identified as one of the contributors to said letter. A subsequent FOIA request indicates that Mr. Mann has discarded the notes he prepared and which were subsequently used in drafting the February 24, 1997 letter. There is at the very least the appearance of impropriety.

Petitioners' Reply at 23. As these alleged incidents of bias were not raised during the comment period, however, we decline to consider them in the present petition. Moreover, even had they been raised earlier, such allegations, without more, are insufficient to convince us that Mr. Mann was "so psychologically wedded" to a negative opinion of petitioners that he "would consciously or unconsciously avoid the appearance of having erred or changed position," and that his negative opinion "as a practical or legal matter foreclosed fair and effective consideration" of the evidence presented in the permitting process." *Marine Shale*, 5 E.A.D. at 788 (quoting *Withrow*, 421 U.S. at 57-58). Thus, petitioners have failed to meet their "heavy burden of overcoming the presumption of honesty and integrity attaching to the actions of government decisionmakers." *Marine Shale*, 5 E.A.D. at 788-89.

[25]Although petitioners also raise this issue in UIC Appeal No. 98-3 relating to permit no. KYA0361, petitioners' comments on the draft permits on this issue only raised objections relating to permit no. KYA0362. Thus, the issue was not preserved for review with regard to permit no. KYA0361.

such as the ones at issue in this case, must demonstrate mechanical integrity at least once every five years during the life of the well. Region's Response at 19; 40 C.F.R. §§ 144.28(g)(2)(iv)(A), 146.23(b)(3). The Region states further that because more than five years have passed since the last demonstration of mechanical integrity, the disputed permit condition was necessary. *See* Exh. 47 (MIT test results for wells on the Boling-Richards Unit Lease - dated November 1, 1989 through December 5, 1990).

In its reply to the Region's response, petitioners do not dispute the Region's assertion that more than five years had passed since MIT testing had been performed or that additional testing is therefore required pursuant to the above-cited regulations. Under these circumstances, we are not convinced that review is warranted on this issue.[26]

2. *Remediation/Casing Injectors*

Part III of the permit states:

> SPECIAL CONDITIONS
>
> Remedial Construction of the W-7
>
> In a letter dated November 14, 1997, Jett Black, Inc. proposed to remediate the Boling-Richards Unit W-7 injection well by cementing the two (2) inch tubing inside

---

[26]In their reply, petitioners state:

> Your Petitioners respectfully submit that an additional standard annular pressure test (SAPT) MIT is not required for the subject wells. Relief under 40 CFR § 144.16 is justified for the reasons discussed above. In the alternative, the permittee has requested the MIT retest methodology contemplated at 146.8(b)(3).

Petitioners' Reply at 24. As this argument was not raised during the comment period, however, we do not address it in this decision.

> 6-1/4 inch casing by placing a cement slurry from the present top of cement (160 feet below ground surface) to surface. This remediation will effectively make the W-7 a casing injector by filling the annular space between the casing and the tubing. Region 4 approves of Jett Black's proposed plan, and as such, makes it part of the permit. Jett Black, Inc. will have 120 days from the effective date of the permit to complete the remediation and pass an approved MI test.
>
> Because the Boling Richards W-7 will be completed as a casing injector with only one level of protection, it shall be required to pass subsequent internal MI test on a two year schedule. Should the Boling Richards W-7 fail an EPA approved MIT, Jett Black, Inc. shall shut-in the well and not resume injection activities until the well is repaired and passes a new MIT. All MITs shall be witnessed by an EPA representative.

Exh. 12.

Petitioners raise two objections to this provision. First, petitioners assert that there is no regulatory basis for requiring that the W-7 well pass an MIT every two years, rather than every five years. Petition at 11; Combined Comments at 3. Although the petition does not cite to any specific regulatory provision, we assume that the five-year period cited by petitioners is derived from 40 C.F.R. § 146.23(b)(3), which provides that "at a minimum," monitoring requirements shall include a demonstration of mechanical integrity "at least" once every five years.

In its response, the Region correctly points out that the five-year monitoring frequency in section 146.23(b)(3) provides only for a maximum time frame within which MITs must be conducted. *See* Region's Response at 20. By including the words "at a minimum" and "at least," this section clearly gives the Region discretion, in appropriate circumstances, to require a shorter testing frequency. In support of a two-year testing frequency in this case, the Region states:

> Because of the nature of casing injectors, the Region determined it is necessary to require the Permittee, as well as similarly situated owners or operators, to demonstrate mechanical integrity every two years. Casing injectors do not offer the level of protection for USDWs that standard injection wells do. Standard injection wells are constructed with an outer casing string and an internal injection tubing; the injection fluids pass through this injection tubing. The outer casing and internal injection tubing are separated by a space called an annulus. This space is sealed and filled with an EPA approved fluid, and its pressure is maintained and monitored for leaks.
>
> Casing injection wells are constructed only with an outer casing and do not have a sealed annulus that can be used to detect leaks on a continuous basis. Therefore a leak will not be detected through annular readings, and a 5-year MIT does not provide adequate additional assurance that the well continues to protect USDWs. For this reason the Region established the permit condition requiring that the Boling Richard W-7 demonstrate mechanical integrity every two years.

Id. at 20.

In its reply, petitioners assert that the Region has improperly required "the routine reduction of the mechanical integrity retesting interval from five (5) years to two (2) years for casing injectors." Petitioners' Reply at 24. According to petitioners, the Region has improperly imposed a two-year retesting interval on all casing injectors, absent any fact-specific evidence that such an interval is required in this case. *Id*. at 24-25.

In their comments on the draft permit regarding the two-year retesting interval, petitioners stated, in part, that "casing injectors on the lease next door, completed in the same formation * * *, are allowed a five

year MIT frequency." Petitioners' Comments at 3. Similarly, petitioners state in their reply that "casing injectors on a contiguous oil lease in the same pool * * * are subject to five (5) year mechanical integrity retesting intervals." Petitioners' Reply at 25. Petitioners state further that "substantially identical injection wells only a few hundred feet away have been allowed five (5) year retestings." *Id*. The Region has not disputed these assertions.

The Region's explanation as found in its response may be plausible but, even if so, the Region has not explained why it has not consistently applied a two-year retesting interval for casing injectors. Because we find nothing in the applicable regulations requiring that casing injectors be automatically subject to a stricter regimen of MITs than other types of wells, and because the Region's past practice -- based on petitioners' undisputed characterization -- seems inconsistent with the explanation the Region has set forth, the permit is remanded on this issue. On remand, the Region must refute petitioners' claim that the Region is approaching casing injectors inconsistently, provide a fact-specific rationale for a two-year testing interval in this case, or revise the permit to reflect a less frequent interval.

Second, petitioners assert that the 120-day compliance schedule for completing remediation of the W-7 well and passing an MIT test is unreasonable and that the permit should be revised to include a three-year compliance schedule. Petition at 12; Combined Comments at 7. As neither the petition nor petitioners' comments on the draft permit provides any explanation of why the 120-day compliance schedule is unreasonable, the petition lacks the degree of specificity necessary to support a petition for review. Review is therefore denied on this issue.

III. *CONCLUSION*

For the reasons stated above, the permits are remanded to the Region. On remand, the Region is ordered to: (1) revise the language in condition I.C.1.(b)(i) of the permits so that it refers to fractures in the confining zone rather than the injection zone; (2) either add annulus gel to

the list of approved annular fluids or provide an explanation for rejecting petitioners' request in light of the Region's past practices in this regard; (3) provide a reasoned response to petitioners' concerns regarding the need for a closed annulus; (4) revise the language of condition I.C.3 to clarify that it does not foreclose the possibility of continuing or resuming injection after a loss of mechanical integrity; (5) revise the permits to clarify that for wells that resume injection after having been shut-in, the permittee will have thirty days in which to submit an injection fluid analysis; (6) revise the language of condition I.E.3. or adequately respond to petitioners' concerns regarding its ability to obtain information on new wells constructed in the area of review of its existing wells; and (7) provide a detailed and fact-specific rationale for including a two-year MIT interval for the W-7 injection well on the Boling-Richards Unit Lease, refute petitioners' claim of inconsistent applications, or revise the testing interval.[27] An appeal of the Region's determinations on remand will not be necessary to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)(iii). On all other issues, review is denied for the reasons set forth above.

So ordered.

---

[27]Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues to be addressed on remand. *See In re Austin Powder Co.*, 6 E.A.D. 713, 721 n.9 (EAB 1997).